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IN THE

Supreme Court of the United States

October Term, 1944.

No. 1255....

BANK OF NEW YORK,

Petitioner,

AGAINST

LOUISE A. GRIFFITH,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

JOSEPHINE E. KESTLER,
Attorney for Respondent.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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The exhaustive opinion of the Circuit Court of Appeals (per Clark, *J.*, writing for a unanimous Court), analyzing and discussing every contention that could have possibly been urged in this litigation appears at page 89 of the Record, and is reported in 147 F. 2nd 899.

The Real Question Presented.

The real question here presented—and a question which needs no second review by this Court (*Ingram* v. *Lewis*, 37 Fed. 2nd 259, cert. denied 282 U. S. 842)—is by no means any of the meaningless abstractions which the petitioner presents on page 4 of its petition.

The only issue here really involved is whether a consent judgment obtained from a beneficiary in a state court by a trustee may be attacked in the Federal Court, where

such consent judgment was wrung from the beneficiary by the trustee's

> "duress" consisting of the trustee's "willful withholding of principal and income of the (trust) estate, initiation of unnecessary and expensive litigations exhausting" this respondent-beneficiary, " * * * and threatened unfair and oppressive expense of litigation and withholding of the (trust) estate, coupled with refusal of information as to the trustee's conduct of the trust."

Such are the allegations of the complaint which must here be taken as facts, as the complaint is here on demurrer (*Locke* v. *Pembroke*, 280 N. Y. 430),—and such is the Circuit Court's own summarization of the breaches of trust of which the petitioning trustee, for the purposes of this proceeding, stands convicted. (See opinion below, p. 90).

May such a trustee, despite the cover of a state court consent judgment which it has extorted from its beneficiary be brought to book in the Federal Court—or may it not?

That is the single issue here presented—and not the question-begging creations which the petitioner poses as "questions" on page 4 of its petition.

POINT I.

The falsity of the "questions" presented by the petitioner.

The one real question in this case is as follows:

> May a trustee who, in a state court, has obtained by duress and fraud a consent judgment of absolution from his beneficiary be sued in the Federal

Court for the damage his fraud and duress have caused?

And this is a question which has already previously been squarely considered by this Court, and found unnecessary of review (*Ingram* v. *Lewis*, 37 Fed. 2nd, 259, cert. denied 282 U. S. 842).

Nor should this question be befogged by the fact that the victimized beneficiary here before appealing to the Federal Court, first vainly appealed to another state court of New York—the Surrogate's Court—to right the wrong which had been perpetrated by the New York Supreme Court decree of August 27, 1941 which had been extorted by the petitioning trustee here from its beneficiary.

For nothing was adjudicated by the learned Surrogate's Court—notwithstanding the respondent-beneficiary's "erroneous legal conclusion" to the contrary in its own complaint below, which as an "erroneous legal conclusion" is of course "denied the dignity of an estoppel." (*Brick* v. *Cohn-Hall-Marx Co.*, 283 N. Y. 99, 105.)

And the Circuit Court's opinion below makes clear that all that "can be sure * * * is that the Surrogate dismissed the (respondent-beneficiary's) petition for reasons not going to the merits" so that "it is not *res judicata* on points which might have been included, but were not adjudicated" (opinion below, page 95 and see cases there cited).

Thus, the fact that the respondent-beneficiary sought relief in the Surrogate's Court and was denied it "for reasons not going to the merits", is no bar to the relief which the beneficiary now here seeks.

It is this fact—"that the Surrogate dismissed the (beneficiary's) petition for reasons not going to the merits"—that disposes of the question (2) which the petitioner presents on page 4 of its petition—in which the petitioner asks whether "the plaintiff here may litigate the same question in the Federal Court" after "having litigated

the issue of extrinsic fraud and duress" in the Surrogate's Court.

The joker in this second question thus propounded by the petitioner on page 4 of its petition is that "the issue of extrinsic fraud and duress" was never tried in the Surrogate's Court.

Such is the kind of joker hidden in every one of the four "questions" posed by the petitioner on page 4 of its petition. The exposure of the falsity of these "questions" will expose also the groundlessness of the entire petition here presented.

A.—Why Petitioner's First "Question" Means Nothing in This Case at Bar.

The first "question" presented by the petitioner on page 4 of its petition is as follows:

> (1) "In a Federal Court must the judgment of a State Court be accorded the same effect as *res judicata* that would be given to it by the courts of the state in which it was rendered?"

There can be but one possible answer to this question thus posed by the petitioner—and that is, that of course the judgment of a state court must "be accorded the same effect as *res judicata*" by the Federal Court as "would be given to it by the courts of the state in which it was rendered."

But what has all of this to do with the real issue here in question?

For a New York state court will accord no more "effect as *res judicata*" to a judgment obtained by extrinsic fraud than will the Federal Court (*Crouse* v. *McVickar*, 207 N. Y. 213).

The Circuit Court's opinion below, as well as the New York authorities, all agree that, just as stated by the Circuit Court below (94):

"The *Crouse* case, therefore, actually reiterates and re-enforces the general rule, well settled in New York, that judgments obtained by extrinsic fraud can be attacked collaterally, *Lapiedra* v. *American Surety Co.*, 247 N. Y. 25, 31, 125 N. E. 710; *Hoes* v. *New York, N. H. & H. R. Co.*, 173 N. Y. 435, 66 N. E. 119; *Ferguson* v. *Crawford*, 70 N. Y. 253, 267; *Manderville* v. *Reynolds*, 68 N. Y. 528, 543. * * * It seems fairly clear, therefore, that New York does allow collateral attack on a judgment for extrinsic fraud or duress, as we concluded after an extensive analysis of the cases dealing with foreign divorce decrees. *Cohen* v. *Randall*, 2 Cir., 137 F. 2d 441, 443, 445, certiorari denied 320 U. S. 796."

Since there is thus no doubt whatsoever, "that New York does allow collateral attack on a judgment for extrinsic fraud or duress", what meaning is there in the petitioner's asking whether "a Federal Court" must give "the same effect as *res judicata*" to a state court judgment as would the state court—when both Federal Court and New York state courts will impeach collaterally a judgment obtained by extrinsic fraud?

The answer is—none.

For the real question is not whether a Federal Court should give any less weight to a state court judgment than would the state court—but whether any court, state or Federal, will give any weight to a judgment obtained by extrinsic fraud (*Crouse* v. *McVickar*, 207 N. Y. 213; *Lapiedra* v. *American Surety Co.*, 247 N. Y. 25; *United States* v. *Throckmorton*, 98 U. S. 61; *Ingram* v. *Lewis*, 37 Fed. 2nd 259, cert. denied 282 U. S. 842.

It thus becomes clear why this first "question" presented by the petitioner on page 4 of its petition is wholly meaningless.

For there can be but one possible answer to this first "question" as propounded by the petitioner—and that an

answer which gives no help in the solution of anything in this litigation here.

B.—Why the Petitioner's Second "Question" Also Is Meaningless in This Case at Bar.

This brings us to the equally meaningless question which is petitioner's (2) on page 4 of its petition, in which it asks:

> (2) "Having litigated the issue of extrinsic fraud and duress in a competent State Court and been defeated, can the plaintiff then litigate the same question in a Federal Court, acting independently?"

But the joker in this "question" as already indicated on pages 3 and 4, *supra*, and as made perfectly clear in the Circuit Court's opinion below (p. 95) is that "the issue of extrinsic fraud and duress" was never "litigated" in any "state court", " * * * competent" as the petitioner puts it—or otherwise.

What shall be said, then, of this second "question" propounded by the petitioner on page 4 of its petition, in which the petitioner asks whether "the issue of extrinsic fraud and duress" can be litigated again, having once been litigated before, when it is realized as the Circuit Court below was at pains to make clear, that "the issue of extrinsic fraud and duress" was never litigated, *even once!* (pp. 95-96, opinion below).

Such is the stripe of each of the "questions" posed by the petitioner.

C.—Why the Petitioner's Third Question Is as Meaningless as Its First Two.

The third "question" which the petitioner poses on page 4 of its petition is as follows:

(3) "Is the rule as to *res judicata* equally as true of questions of law in their relation to the controversy before the Court as to questions of fact?"

This is another question which just like the first "question" posed by the petitioner allows for only one answer—namely, that of course, "the rule as to *res judicata* (is) equally true of questions of law" as it is "to questions of fact" (*sic*).

But having thus answered the petitioner's question as presumably it would like to have it answered, where then does such answer leave us in the concrete situation at bar?

For the learned Surrogate's Court of New York having "dismissed the (beneficiary's) petition for reasons not going to the merits" (Circuit Court's opinion, p. 95), it is perfectly clear that such dismissal "is not *res judicata* on points which might have been included, but were not adjudicated" (Circuit Court's opinion, p. 95 and see cases there cited).

Where then is the *res judicata* here at all?

And since there is no *res judicata* here at all, of what avail is it to the petitioner to pose the abstraction whether "the rule as to *res judicata*" is as true with regard to "questions of law" as it is with regard to "questions of fact?"

What has any such empty riddle at all to do with the real questions that were so fully discussed by the Court below?

D.—Why the Petitioner's Fourth "Question" Is as Meaningless at Bar as Are Its First Three Questions.

The final "question" propounded by the petitioner (top of page 5 of its petition) is as empty an abstraction divorced from anything real in the case at bar as are the first questions posed by the petitioner.

In "question" (4) the petitioner solemnly asks:

> "Is there a jurisdiction in Federal Courts to review and revise the acts and decisions of courts of coordinate jurisdiction upon questions which they have lawfully considered and adjudged?"

What possible answer can there be to this question but that, of course, no Federal Court will "review and revise the acts and decisions of courts of coordinate jurisdiction upon questions which they have lawfully considered and adjudged."

But where in this case at bar is there any court which has "lawfully considered and adjudged" whether the judgment wrung by the petitioning trustee from the beneficiary at bar on August 27, 1941 was obtained by extrinsic fraud or not?

Not the Surrogate's Court—as made fully clear in the Circuit Court's opinion below (p. 95).

For the Surrogate "dismissed the petition for reasons not going to the merits" (p. 95), so that nothing was "adjudged" by that court on the issue of extrinsic fraud and duress.

And, of course, the Supreme Court of New York which was used by the petitioner "as a well considered step * * * in the scheme leading to the fraud" which it perpetrated upon its beneficiary (p. 93), has never "lawfully considered and adjudged" the question as to whether its own judgment was procured by extrinsic fraud and duress or not.

Thus, though there is no court that has as yet "lawfully considered and adjudged" the question as to whether the Supreme Court judgment of August 27, 1941 was obtained by extrinsic fraud and duress or not, petitioner completes its list of "questions" with a final empty abstraction in which it asks meaninglessly whether there is "jurisdiction in Federal Courts to review * * * the acts * * *

of courts of coordinate jurisdiction upon questions which they have lawfully considered and adjudged!"

Thus, utterly groundless, and of no meaning, are the "questions" which the petitioner asserts are here involved —and equally groundless and meaningless are the allegations of "errors" which petitioner, on page 7 of its petition, asserts were made by the Court below.

POINT II.

The petitioner's own statement of the alleged "errors" of the Circuit Court below reveals that the Court below erred not at all.

The petitioner asserts that the Circuit Court below erred in "holding that the facts alleged in the complaint constituted the statement of a cause of action when the State Court had already adjudged otherwise."

But, of course, as already made clear, a main point of the Circuit Court's opinion below was that *NO* "State Court had already adjudged otherwise"—which is precisely why the Court below felt free to assume jurisdiction of the case (p. 95 of opinion below).

Yet the petitioner persists in blinding its eyes to this main point which bulks so large in the Circuit Court's opinion below—that the Federal Court could here assume jurisdiction precisely because no "state court had already adjudged" the question of extrinsic fraud in issue here (p. 95, opinion below).

The third specification of errors which the petitioner sets forth on page 7 of its petition, in which it alleges that the Circuit Court of Appeals erred "in departing from the accepted and usual course of judicial proceedings by overruling and reversing the decision of a State Court having prior jurisdiction" is simply a repetition in different words

of the first specification of errors which the petitioner alleges—and is equally meaningless. For no "State Court", whether it be Supreme Court or Surrogate's Court, ever made any decision on the one question here involved—as to whether the Supreme Court decree of August 27, 1941 was obtained by extrinsic fraud and duress or not.

Nor is it "true" as petitioner says on page 12 of its petition, "that the law of New York affords no remedy such as the Circuit Court of Appeals has directed." (To the emphatic contrary see *Crouse* v. *McVickar*, 207 N. Y. 213, *Lapiedra* v. *American Surety Co.*, 247 N. Y. 25, and the other cases cited in the Circuit Court opinion below at p. 94.)

All that is true is that in the *same* action in which the consent judgment was extorted from the beneficiary, it would be impossible to obtain "an adequate remedy" (*Gysin* v. *Gysin*, 263 N. Y. 509, and other cases cited in Circuit Court's opinion, p. 96).

This is not to say, however, that in a "new" suit in the New York State court, the plaintiff beneficiary would be denied relief (*Crouse* v. *McVickar*, 207 N. Y. 213, *U. S.* v. *Throckmorton*, 98 U. S. 61, 65).

The choice as to which forum to elect is, of course, the plaintiff's. She is not to be turned away from the Federal Court, to which she appeals on the ground of diversity of citizenship, because the action that she brings here in a "new" suit is one that she could also have brought in the state court also, in a "new" suit (*United States* v. *Throckmorton*, 98 U. S. 61, 65).

Thus the remedy that would be the plaintiff beneficiary's in the New York State Court is the same remedy that she is now seeking here in the Federal Court—that is, the impeachment of a New York State court judgment obtained by extrinsic fraud (*Crouse* v. *McVickar*, 207 N. Y. 213, *Ingram* v. *Lewis*, 37 Fed. 2d 259, cert. denied 282 U. S. 842).

This brings us, in conclusion, to the typical joker contained in the second "specification of errors" where the petitioner claims that the Circuit Court of Appeals erred in

> "deciding, in conflict with applicable local decisions, that, as a matter of substantive law, a trustee may not, under pain of duress, insist on a release or judicial decree, settling the trust accounts as a condition of turning over the trust property."

But where is the "substantive law" of New York State which holds that a trustee may use trust property as a weapon in intimidating a beneficiary into agreeing to "a release or judicial decree" without being subsequently called to account for it?

Indeed, the "substantive law" of New York State is quite the contrary, and, of course, wholly in agreement with the Federal Court rule, and the general rule as expressed in *Ingram* v. *Lewis*, 37 Fed. 2nd 259, cert. denied 282 U. S. 842—"that judgments obtained by extrinsic fraud can be attacked collaterally" (see the numerous cases cited in the Circuit Court's opinion below, pp. 93 and 94).

Thus squarely controlling in the matter, in perfect accord with the New York rule which is also the general rule, as expressed in the cases cited on pages 93 and 94 of the opinion below, see the case of *Ingram* v. *Lewis*, 37 Fed. 2nd, 259, cert. denied 282 U. S. 842, which the petitioner waves away on page 13 of its petition as the case "of a Creek Indian fallen among thieves."

The petitioner would seem to intimate, reading page 13 of its petition, that somehow or other "a rule laid down in Oklahoma for the protection of a Creek Indian fallen among thieves" (*Ingram* v. *Lewis*, *supra*), is not the same, and should not be the same, as the rule laid down in New York for the protection of a trust fund lamb fallen among the money changers of Wall Street.

If that is so, then, indeed, there may be something for this Court to review.

But, in truth, there is nothing for this Court to review (*Ingram* v. *Lewis*, 37 Fed. 2nd 259, cert. denied 282 U. S. 842.

For the law in Oklahoma on the point is precisely the same as the law in New York (*Crouse* v. *McVickar*, 207 N. Y. 213) and the law as expressed in the Federal Court and already reviewed by this Court (*Ingram* v. *Lewis*, 37 Fed. 2nd 259, cert. denied 282 U. S. 842), is no different from the "substantive law" as expressed in New York State (*Crouse* v. *McVickar*, 207 N. Y. 213; *Ross* v. *Preston*, 292 N. Y. 433, 437; *Byrnes* v. *Owen*, 243 N. Y. 211; *Verplank* v. *Van Buren*, 76 N. Y. 247, and see all the other cases cited on this point on pp. 93 and 94 of the learned court's opinion below).

And the law on this point—that a state court judgment obtained by extrinsic fraud may be collaterally attacked in the Federal Court—has already been analyzed by this Court and found not wanting—and found to be the same whether applied to a "Creek Indian fallen among thieves" or to a trust fund beneficiary fallen amongst the security manipulators of Wall Street (*Ingram* v. *Lewis*, 37 Fed. 2nd 259, cert. denied 282 U. S. 842; *Crouse* v. *McVickar*, 207 N. Y. 213).

Respectfully submitted,

JOSEPHINE E. KESTLER,
Attorney for Respondent.